

IN THE SUPREME COURT OF MISSOURI

JAMES KLOTZ and)
MARY KLOTZ,)
)
Appellants/Cross-Respondents,)
)
vs.)
)
MICHAEL SHAPIRO, MD and METRO)
HEART GROUP OF ST. LOUIS, INC)
)
Defendants/Cross-Appellants.)

BRIEF OF AMICUS CURIAE MISSOURI AFL-CIO
IN SUPPORT OF PLAINTIFFS/APPELLANTS

Matthew J. Padberg #31431
The Padberg & Corrigan Law Firm
A Professional Corporation
1926 Chouteau Avenue
St. Louis, MO 63103
(314) 621-2900
(314) 621-7607 (Fax)

Interest of Amicus Curiae

The Missouri AFL-CIO is interested in the outcome of this matter insofar as it affects Missouri citizens that are part of the AFL-CIO. The Missouri AFL-CIO is a federation of unions in Missouri that are affiliated with the National American Federation of Labor—Congress and Industrial Organizations. This includes AFL-CIO’s central labor councils, as well as local unions, trade union associations, committees, councils, districts, and regional groups whose parent organizations are also affiliated with the National AFL-CIO. The Federation of Unions encompasses such diverse areas of labor as nursing, construction, transportation, and food workers. The issues presented to this Court are of vital importance to its members.

Consent of the Parties

Plaintiffs/Appellants and Defendants/Respondents have consented to the filing of the Brief of Amicus Curiae Missouri AFL-CIO in Support of Plaintiffs/Appellants.

Points Relied On

- I. The cap on non-economic damages set forth in Section 538.210 R.S.Mo. is not rationally related to a legitimate state interest because it presents arbitrary and irrational classifications.**

Jurisdictional Statement

The Supreme Court has jurisdiction over this appeal because it involves a constitutional challenge to a statute of the State of Missouri pursuant to Article V, Section 3 of the Missouri Constitution. Your amicus asserts an interest in Appellants James and Mary Klotz's appeal of the judgment of the Circuit Court of St. Louis County.

Statement of Facts

Your amicus adopts the Statement of Facts of Plaintiffs/Appellants James and Mary Klotz.

Argument

I. The cap on non-economic damages set forth in Section 538.210 R.S.Mo. is not rationally related to a legitimate state interest because it presents arbitrary and irrational classifications.

The brief of Plaintiffs/Appellants addresses the issues of whether Section 538.210 fails a rational basis review because the caps set arbitrary and irrational classifications and fails to achieve its stated objectives. Your amicus defers to the briefs of the Plaintiffs/Appellants which expertly presents the constitutional challenges present in the non-economic caps imposed by Section 538.210 R.S.Mo. Your amicus does not believe that it can improve on the presentation of the arguments on those issues. However, your amicus does believe that there are certain policy considerations that are specific both to your amicus' Federation of Unions, as well as other laborers and workers of the State of Missouri, that are affected by the arbitrary and irrational classifications created by Section 538.210 R.S.Mo.

The non-economic caps imposed by Section 538.210 were ostensibly established to stabilize malpractice insurance premiums. Others have put forth meritorious arguments that other means were available to accomplish this goal. There have also been meritorious arguments that certain suspect classes are disproportionately affected by non-economic caps. What is lost, however, is the impact on Missouri's working class population: the people that perform the day to day labor necessary to keep our economy strong.

Non-economic damage caps should ideally affect everyone equally. And while on its face Section 538.210 appears to do so, in reality it does not. Many examples undoubtedly exist on how this cap affects Missouri citizens differently. But for your amicus, the examples are particularly relevant when focused on Missouri's working families.

We are currently living in what has been variously described as a recession or mild depression. In times of economic downturn, layoffs are rampant. Most layoffs occur to those in less skilled positions. Unemployment rates rise. Fewer people are working. Workers who are unable to work are disproportionately affected by non-economic caps than those who are working.

A person injured by medical malpractice while out of work due to an economic downturn has limited or non-existent economic damages. Injuries that disable workers from returning to work (that may someday become available) are only compensable as non-economic items of damage. If an injured worker is out of work, there are no economic damages to award. The notion that the worker may return to work at some unknown date in the future at a wage rate that is unidentified is impossible to calculate; often, such evidence is rejected as speculative.

The effect of non-economic damage caps on the labor force is to punish hourly wage earners more so than white collar workers, who often keep their salaried jobs at the expense of hourly workers. Those who are unemployed, temporarily or indefinitely, are more adversely affected by non-economic caps than those capable of maintaining employment. A worker who is indefinitely laid off from work and who sustains the same

injury as a management employee who is not missing time from their salaried employment is treated differently, insofar as management employees are capable of collecting economic losses along with non-economic losses. However, the temporarily-out-of-work wage earner has no economic losses to claim. Therefore, their sole source of compensation is non-economic losses. A temporary change in one's work status thus has a dramatic impact on the compensation available to a victim of malpractice.

Moreover, many permanent injuries affect an hourly wage earner more profoundly than white collar workers. A worker who loses a limb to medical negligence for instance, may return to work. A construction worker, nurse, driver, or other labor-intensive worker who has suffered a severe disability may face struggles far exceeding that of a worker who has a desk-related occupation. While rarely acknowledged, labor-intensive workers with such disabilities have reduced work expectancy, limited advancement opportunities, and greater difficulty completing ordinary tasks. A cap on non-economic damages has a disparaging impact on such workers.

Likewise, a younger worker with a given disability is more disadvantaged by non-economic caps than an older worker. Becoming partially disabled from medical malpractice at a younger age means more suffering with less compensation than one who suffers the same injury at an advanced age. A construction worker who loses a limb at twenty-five years of age, but manages to stay working, must deal with that disability for a much longer period than a fifty-year-old. Yet, non-economic damages for both are capped. Clearly, one suffers more and may have less opportunity than another. But the cap vitiates a jury's determination that the younger worker's injury requires greater

compensation. Regardless of what a jury would award, the caps would equalize both claims.

Section 538.120 R.S.Mo. also provides protection from large verdicts based on non-economic damages for workers in one industry, while providing no such protection for workers of other industries. Section 538.120 R.S.Mo. protects those practicing in the health care industry, such as physicians, from a large verdict based on non-economic damages that are greater than \$350,000.00. No other industry receives this protection. The Missouri AFL-CIO represents diverse areas of labor including construction, transportation, and food workers. Workers in industries such as those represented and comprising the Missouri AFL-CIO do not receive this protection from large verdicts based on non-economic damages over \$350,000.00. A plaintiff with the severe injuries without large economic damages will not be affected by Section 538.210 R.S.Mo., if he or she files suit and receives a large verdict against a worker in the construction industry for damages and injuries that worker caused. That same plaintiff will have a limited recovery if he or she files suit and receives a large verdict against a physician.

A plaintiff should not get less than full recovery because he or she was injured by a physician. Similarly, workers of all industries should be subjected to the same responsibility and liability for their actions. A defendant is to be liable for **all** the injuries and damages he or she causes a plaintiff by his or her negligence. Section 538.210 R.S.Mo., enables a physician defendant to be less responsible for the losses that he or she causes. Section 538.210 R.S.Mo. is unjust because it provides less than full recovery for a plaintiff injured by a defendant that is in the health care industry and provides that a

defendant member of the health care industry that is negligent is less responsible or liable for his or her negligent acts.

As stated previously, your amicus defers to the briefs of Plaintiffs/Appellants, as well as the other amicus, on the issues of whether Section 538.210 fails a rational basis review because the caps fail to achieve their stated objectives. Those arguments were expertly put forth by the other parties. Your amicus certainly agrees with all of the arguments advanced to overturn Section 538.210. Amicus encourages the Court to consider the impact these caps have on the working families of Missouri.

Your amicus has tried to set forth some additional circumstances under which non-economic caps work to the detriment of Missouri citizens, and in particular those citizens with lower paying jobs and who are more subject to downturns in the economy. Certainly, many other examples exist. It is hoped that this Court will consider these policy arguments with the many other policy arguments advanced by other parties to this action to arrive at the conclusion that caps on non-economic damages not only frustrate the constitutional purpose behind compensating injured victims, but also frustrates a jury's determination as to what would be appropriate in any one instance.

Conclusion

Section 538.210 R.S.Mo., disparately affects the citizens of the State of Missouri that make up the organizations represented by the Missouri AFL-CIO. The non-economic damages cap has the potential to greatly reduce a verdict given to an individual worker temporarily laid off due to an economic slump in a particular industry. Workers that earn hourly wages are more affected by the non-economic damages cap than workers that earn a salaried wage. The non-economic damages cap protects members of the health care industry from large verdicts based on non-economic damages, while providing no such protection to workers in any other industry.

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CERTIFICATE OF COMPLIANCE

COME NOW counsel for Plaintiffs/Appellants, and for their certificate of compliance, state as follows:

1. The undersigned do hereby certify that Amicus Curiae Missouri AFL-CIO's brief filed herein complies with the page limits of Rule 84.06(b) and contains 1,593 words of proportional type.
2. Microsoft Word was used to prepare this brief.
3. The undersigned do hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

THE PADBERG & CORRIGAN LAW FIRM
A Professional Corporation

By _____
Matthew J. Padberg #31431
1926 Chouteau Avenue
St. Louis, MO 63103
(314) 621-2900
(314) 621-7607 (Fax)

BOYD & KENTER, P.C.

By _____
John B. Boyd #23716
1150 Grand Boulevard, Suite 700
Kansas City, MO 64106-2317
Phone: (816) 471-4511
Facsimile: (816) 471-8450
Email: jboyd@boydkenterlaw.com

Attorneys for Amicus Curiae Missouri AFL-CIO

Certificate of Service

The undersigned hereby certifies that two (2) copies of Plaintiffs/Appellants' Brief and one copy of the accompanying disk were mailed this _____ day of July, 2009, to:
Mary Coffey, Attorney for Plaintiffs, 6202 Columbia Avenue, St. Louis, MO 63139; and
J. Thaddeus Eckenrode, Attorney for Defendants Metro Heart Group of St. Louis, Inc.
and Michael Shapiro, M.D., 8000 Maryland Avenue, Suite 1300, Clayton, MO 63105.

John B. Boyd #23716

Table of Contents

	<u>Page</u>
Table of Authorities	i
Interest of Amicus Curiae	1
Consent of the Parties	2
Points Relied On	3
Jurisdictional Statement	4
Statement of Facts	5
Argument	6
Conclusion	11
Certificate of Compliance	12
Certificate of Service	13

Table of Authorities

Amicus Curiae Missouri AFL-CIO defers the cases cited by
Plaintiffs/Appellants in support of the constitutional arguments.